

1 Hon. Ricardo S. Martinez
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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

7 THOSE CERTAIN UNDERWRITERS AT
8 LLOYD'S OF LONDON and LONDON
9 MARKET INSURERS, subscribing to the
10 Policy with the Unique Market Reference
11 B1093C080906,

12 Plaintiff,

13 vs.

14 EUGENE HORTON, LLC, a Washington
15 limited liability corporation; EUGENE
16 HORTON, and individual; and OAMPS
17 SPECIAL RISKS, LTD., a Lloyd's broker,

18 Defendants.

No. 11-cv-02111

DEFENDANTS' EUGENE HORTON,
LLC AND EUGENE HORTON'S FRCP
12(B)(1) MOTION TO DISMISS

**NOTE ON MOTION CALENDAR:
FEBRUARY 24, 2012**

18 Defendants, EUGENE HORTON, LLC and EUGENE HORTON, move to dismiss
19 Plaintiffs' complaint on the grounds that the court lacks subject matter jurisdiction.

20 **I. FACTS**

21 Plaintiffs, Those Certain Underwriters at Lloyd's of London and London Market
22 Insurers, subscribing to the Policy with the Unique Market Reference B1093C080906
23 (hereinafter "Lloyd's"), seek damages allegedly resulting from negligent misrepresentations
24 made by Defendants with respect to a policy of insurance issued by Lloyd's to Stephen
25 Yadvish (hereinafter "Yadvish") and insuring a 125' yacht ("hereinafter "Northcoast 125")
under construction by Northcoast Yachts, Inc. (hereinafter "Northcoast"). Plaintiffs allege this

DEFENDANTS' HORTON FRCP 12(B)(1)
MOTION TO DISMISS - 1
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1 Court has admiralty jurisdiction pursuant to 28 U.S.C. §1333 and diversity of citizenship
2 between plaintiffs and defendants pursuant to U.S.C. §1332.

3 Defendant Eugene Horton is an insurance broker and member of Eugene Horton, LLC
4 (hereinafter defendants “Horton”). In 2009, at Mr. Yadvish’s request, Defendants Horton
5 placed a yacht insurance policy covering the Northcoast 125 through Defendant OAMPS
6 Special Risks, Ltd. (hereinafter “OAMPS”), a Lloyd’s broker.¹ The Lloyd’s yacht policy
7 included coverage under the Longshore and Harbor Worker’s Compensation Act (LHWCA).
8 In 2009, a worker on the Northcoast 125 was injured, and in 2010 the injured worker made a
9 claim under the LHWCA. At the time the Lloyd’s policy was issued, and at the time of the
10 injury to the worker, the Northcoast 125’ was under construction in a Tacoma construction
11 yard.²

14 **II. PROCEDURAL HISTORY**

15 In 2010, Northcoast and Yadvish filed suit against Lloyd’s, Defendants Horton and
16 Defendant OAMPS in Pierce County Superior Court, known as *Northcoast Yachts, et al., v.*
17 *Sea-Mountain Insurance, et al.*, Cause No. 10-2-08513-6. On June 3, 2011, Pierce County
18 Superior Court Judge Brian Tollefson granted Defendants’ Horton Motion for Partial Summary
19 Judgment, declaring LHWCA coverage existed for Stephen Yadvish under the Lloyd’s policy.
20 Judge Tollefson subsequently granted Northcoast/Yadvish’s Motion for *Olympic Steamship*
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24 ¹ Access to the Lloyd’s market is made through a London broker authorized to place insurance with the Lloyd’s
market, Plaintiffs’ complaint, ¶10, p. 3, lines 14-16.

25 ² Complaint, ¶¶12-15 and ¶32.

1 fees against Lloyd's.³

2 Lloyd's settled with Northcoast and Yadvish in the Pierce County Superior Court case
3 and subsequently filed this action to recover funds paid, in whole or in part, in settlement of the
4 state court proceeding.⁴

5 The Court lacks diversity jurisdiction because there is not complete diversity of
6 citizenship. In a case where all plaintiffs are foreign citizens, the presence of a foreign citizen
7 as a party defendant destroys complete diversity, *Grupo Dataflux v. Atlas Global Group, L.P.*
8 541 U.S. 567, 569 (2004), *Faysound Limited v. United Coconut Chemicals*, 878 F.2d 290 (9th
9 Cir. 1989). Further, every underwriter of insurance through Plaintiffs Lloyd's, not just the lead
10 underwriter for a syndicate, must be named and must be of diverse citizenship to satisfy
11 diversity jurisdiction, *Carden v. Arkoma Associates*, 494 U.S. 185, 195 (1990), *Majestic*
12 *Insurance Co. v. Allianz International Insurance Co.*, 133 F.Supp.2d 1218 (N.D. California
13 2001).

14 The Court has no admiralty jurisdiction since the facts and circumstances giving rise to
15 Plaintiffs' claims did not occur on or over navigable waters and the actions giving rise to the
16 alleged tort do not bear a significant relationship to any traditional maritime activity,
17 *Taghodomi v. U.S.*, 401 F.3d 1080, 1084 (9th Cir. 2005).

18 Finally, Lloyd's claim based on alleged negligent misrepresentations is barred by the
19 *Rooker-Feldman* Doctrine in that the same allegations regarding misrepresentations were made
20 by Lloyd's in the Pierce County Superior Court action and the *Rooker-Feldman* Doctrine

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25³ Complaint, ¶36.

⁴ Complaint, ¶37.

1 prohibits the Court from exercising subject matter jurisdiction over this case that is a de facto
2 appeal from the Pierce County Court's ruling, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413
3 (1923), *Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005).

4

5 III. ARGUMENT

6 Federal Rule of Civil Procedure 12(b)(1) permits a party to assert by motion the
7 defenses of lack of subject matter jurisdiction. For purposes of a motion to dismiss, material
8 allegations of the complaint are taken as admitted, *Jenkins v. McKeithen*, 395 U.S. 411 (1969).

9 **A. The Court lacks subject matter jurisdiction.**

10 **1. There is no diversity of citizenship.**

11 The party seeking to establish diversity jurisdiction bears the burden of proof, *Kokkonen*
12 *v. Guardian Life Ins. Co.*, 511 U.S. 375,377 (1994). Plaintiff must allege the *citizenship* of all
13 parties; merely alleging that a party is a resident of a certain state or country is insufficient to
14 establish the *citizenship* of that party, *Hodgson v. Bowerbank*, 9 U.S. 5 Cranch 303, 3 L.Ed. 108
15 (1809), *Seven Resorts, Inc. v. Cantlen*, 57 F.2d 771, 774 (9th Cir. 1995).

17 Plaintiffs' complaint alleges that Defendant Eugene Horton LLC is a Washington
18 limited liability corporation and that Defendant Eugene Horton is a Washington resident and
19 insurance broker.⁵ The complaint alleges that Defendant OAMPS is a "foreign entity and a
20 registered Lloyd's broker".⁶ Defendants Horton are residents and citizens of Washington. The
21 citizenship of Defendant OAMPS is not alleged.

23 The complaint alleges that Plaintiffs "are foreign entities with their principal places of
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25 ⁵ Complaint, ¶¶5 & 6, p. 2, lines 21-22.

⁶ Complaint, ¶7, p.3, line 1.

1 business in London, England. Underwriters consist of four Lloyd's of London syndicates,
2 including the Travelers Syndicate, and an insurance company, the Royal & Sun Alliance
3 Insurance Co.”⁷ Plaintiffs’ FRCP 7.1 statement discloses that “The Lloyd’s syndicates are
4 unincorporated associations” and that “The ultimate parent company of Royal & Sun Alliance
5 Insurance is Royal & Sun Alliance Insurance Group plc.”⁸ The complaint fails to allege the
6 citizenship of Royal & Sun Alliance Insurance Co. or the citizenship of the Underwriters or of
7 Travelers Syndicate.

9 **2. Plaintiffs are unincorporated associations and each name or member of the**
10 **syndicate must be diverse.**

11 28 U.S.C. §1332(a) provides original jurisdiction in civil actions where the matter in
12 controversy exceeds \$75,000 and is between: citizens of a State and citizens or subjects of a
13 foreign state [28 U.S.C. Section 1332(a)(2)]; and, citizens of different States and in which
14 citizens or subjects of a foreign state are additional parties [28 U.S.C. Section 1332 (a)(3)].

15 The citizenship of each member of an unincorporated association must be considered in
16 determining whether diversity exists, *Carden v. Arkoma Associates*, 494 U.S. 185, 195 (1990).
17 Lack of diversity of citizenship of each member of an unincorporated association destroys the
18 requirement of complete diversity, *Strawbridge v. Curtiss*, 3 Cranch 267, 2 L.Ed. 435 (1806).

20 Although there is division between the Courts of Appeal on the issue, a majority of
21 courts that have ruled on this issue have held that Lloyd's syndicates are unincorporated
22 associations and thus the rule from *Carden* applies to determine the citizenship of the parties,
23

24

⁷ Complaint, ¶4, p.2, lines 17-20.

25 ⁸ Plaintiffs’ FRCP 7.1 Statement, p. 2, lines 3-7.

1 *Indiana Gas Co. v. Home Insurance Co.*, 141 F.3d 314 (7th Cir.1998); *Underwriters at Lloyd's*
2 *London v. Osting-Schwinn*, 13 F.3d 1079 (11th Cir. 2010); *E.R. Squibb & Sons v. Accident and*
3 *Casualty Insurance Co.*, 160 F.3d 925 (2nd Cir. 1998).⁹ Defense counsel could find no 9th
4 Circuit case addressing the issue. A California District Court has applied the majority rule,
5 *Majestic Insurance Co. v. Allianz International Insurance Co.*, 133 F.Supp.2d 1218 (N.D. Cal.
6 2001).

8 Plaintiffs' FRCP 7.1 statement indicates that Lloyd's syndicates are "unincorporated
9 associations".¹⁰ Other than Traveler's Syndicate and Royal & Sun Alliance Insurance
10 Company, Plaintiffs have failed to allege the names and citizenship of all persons or entities
11 who comprise the four syndicates (and fail to allege the citizenship of either Traveler's or
12 Royal & Sun Alliance).

14 **3. Where all Plaintiffs are foreign citizens, the presence of foreign citizens as
15 party defendants destroys complete diversity.**

16 In this case, Plaintiffs are alleged to be "foreign entities with their principal places of
17 business in London, England". Defendant OAMPS is alleged to be a "foreign entity and a
18 registered Lloyd's broker". The presence of foreign citizens as party defendants, where all
19 plaintiffs are foreign citizens, destroys complete diversity, *Grupo v. Dataflux v. Atlas Global*

21 ⁹ The 6th Circuit examines only the names of lead underwriters to determine diversity, *Certain Underwriters at
22 Lloyd's, London v. Layne*, 26 F.3d 39 (6th Cir. 1994).

23 ¹⁰ Lloyd's is not an insurance company but a marketplace where insurance investors buy and sell insurance risk.
24 The individual investors are known as "underwriters" or "Names" and do not operate individually but as
25 members of "syndicates". "Syndicates" are groups of Names which underwrite coverage for an insured. The
 syndicate may have hundreds or thousands of investors. Names delegate authority to the "active underwriter" in
 the syndicate. Names have unlimited personal liability, but only for their share of the syndicate's losses. Under
 British law, the syndicates themselves are not legally recognized as persons having their own citizenship.
 Transamerica Corporation v. Reliance Insurance Company of Illinois, 884 F. Supp. 133, 137 (Delaware 1995).

1 *Group, L.P.*, 541 U.S., 567,569 (2004), *Faysound Limited v. United Coconut Chemicals*, 878
2 F.2d 290 (9th Cir. 1989), *Oteng v. Golden Star Resources, LTD*, 615 F.Supp.2d 1228 (Colorado
3 2009).

4 Plaintiffs are “foreign entities” and Defendant OAMPS is a “foreign entity”. There is no
5 United States citizen on Plaintiffs’ side of the case and the presence of foreign “entities”
6 (assuming the foreign entities are foreign citizens) on both sides of the case destroys complete
7 diversity.

9 **4. Plaintiff’s claims are barred by the *Rooker-Feldman* doctrine.**

10 Federal courts lack jurisdiction to review state court final judgments, *Rooker v. Fidelity*
11 *Trust Co.*, 263 U.S. 413 (1923), *Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280
12 (2005) (When there is parallel state and federal litigation, *Rooker-Feldman* not triggered by
13 entry of judgment in state court), *Lance v. Dennis*, 546 U.S. 459 (2006), *Carmona v. Carmona*,
14 603 F.3d 1041 (9th Cir. 2010). *Rooker-Feldman* prevents lower federal courts from exercising
15 jurisdiction over cases brought by “state-court losers” challenging state court judgments
16 rendered before the district court proceedings commenced, *Lance v. Dennis*, 546 U.S. 459, 460
17 (2006) (doctrine does not bar action by nonparties in privity with a party to the state court
18 judgment). The doctrine applies even if a party does not directly challenge the merits of the
19 state court decision; and prohibits a federal district court from exercising subject matter
20 jurisdiction over a suit that is a de facto appeal from a state court judgment, *Reusser v.*
21 *Wachovia Bank, N.A.*, 525 F.3d 855, 859 (9th Cir 2008).

24 If claims raised in the federal court action are “inextricably intertwined” with the state
25 court’s decision such that the adjudication of the federal claims would undercut the state ruling

1 or require the district court to interpret the application of state laws or procedural rules, then the
2 federal complaint must be dismissed for lack of subject matter jurisdiction, *Bianchi v.*
3 *Rylaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003). Once a federal plaintiff seeks to bring a
4 forbidden de facto appeal, that federal plaintiff may not seek to litigate an issue that is
5 “inextricably intertwined” with the state court judicial decision from which the forbidden de
6 facto appeal is brought, *Noel v. Hall*, 341 F.3d 1148 (9th Cir. 2003).

8 Lloyd’s answer filed in the Pierce County Superior Court action includes a counterclaim
9 against Northcoast/Yadvish alleging that they, or their agents (including Defendants Horton),
10 made negligent or intentional misrepresentations in connection with the placement of the
11 policy.¹¹ Defendants Horton sought and obtained a declaration in Pierce County Superior
12 Court that the Lloyd’s policy provided coverage for Stephen Yadvish for LHWCA claims. In
13 opposition to that motion, Lloyd’s filed a memorandum of points and authorities arguing that a
14 material issue of fact existed whether the policy was enforceable as a result of alleged material
15 misrepresentations made by or on behalf of Yadvish. Specifically, Lloyd’s brief stated:

17 “...that Yadvish and Horton misrepresented the ownership of the yacht, the
18 moorage of the yacht, the intended uses of the yacht, and the extent of completion
19 of the yacht.”¹²

20 ...

21 “The fact that Northcoast knew the yacht needed at least another six months work
22 by a crew of 40 and would therefore spend at least half of the period of
Underwriter’s yacht policy as a construction project was a critical fact that
Yadvish knew but failed to disclose.”¹³

23 The Hon. Judge Brian Tollefson granted Defendants’ Horton Motion for Partial
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25 ¹¹ Declaration of Deborah A. Severson, **Exhibit 1**, p. 8 lines 13-16.

1 Summary Judgment, ruling that the Lloyd's policy provided Stephen Yadvish with LHWCA
2 coverage¹⁴. This is not a case of parallel state and federal court litigation; the Pierce County
3 Superior Court ruling was made long before this case was filed.
4

5 In the complaint filed before this Court, Lloyd's alleges almost verbatim the same
6 misrepresentations as it argued before the Piece County Superior Court: Horton misrepresented
7 who owned the yacht¹⁵, Horton misrepresented that the yacht would be moored at Lake
8 Union¹⁶, Horton misrepresented that Yadvish intended to use the yacht as his personal yacht¹⁷,
9 Horton misrepresented the percentage of completion of the yacht¹⁸ and Horton failed to
10 disclose that the exposure to be insured was for up to 30 shipyard workers.¹⁹

11 Plaintiffs' complaint is a de facto appeal from a state court final judgment from which
12 Lloyd's took no appeal. "A federal district court dealing with a suit that is, in part, a forbidden
13 de facto appeal from a judicial decision of a state court must refuse to hear the forbidden
14 appeal. As part of that refusal, it must also refuse to decide any issue raised in the suit that is
15 'inextricably intertwined' with an issue resolved by the state court in its judicial decision.",
16 *Noel v. Hall*, 341 F.3d 1148, 1158 (9th Cir. 2003).
17

18 Plaintiffs do not expressly plead that the Pierce County Superior Court decision was
19 erroneous; however the relief sought – money paid by Lloyd's to Northcoast/Yadvish in
20 settlement – if granted operates to nullify Judge Tollefson's ruling that the Lloyd's policy
21

22¹² Declaration of Deborah A. Severson, **Exhibit 2**, p. 10, lines 13-15.

23¹³ Declaration of Deborah A. Severson, **Exhibit 2**, p. 19, lines 9-12.

24¹⁴ Declaration of Deborah A. Severson, **Exhibit 3**.

25¹⁵ Complaint, ¶25.

¹⁶ Complaint, ¶27.

¹⁷ Complaint, ¶28.

¹⁸ Complaint, ¶29.

1 provided LHWCA coverage for Yadvish (and Judge Tollefson's ruling ordering Lloyd's to pay
2 *Olympic Steamship* fees to Northcoast/Yadvish). The remedy ultimately sought by Lloyd's in
3 this case is relief from the partial summary judgment ruling in Pierce County Superior Court.
4

5 **B. The Court lacks admiralty jurisdiction.**

6 The district courts have original jurisdiction of cases in admiralty or maritime, "saving
7 to suitors in all cases all other remedies to which they are otherwise entitled", 28 U.S.C.
8 §1333(1). The party seeking to invoke maritime jurisdiction must show a substantial
9 relationship between the activity giving rise to the incident and traditional maritime activity,
10 *Sisson v. Ruby*, 497 U.S. 358, 367 (1990) (storage and maintenance of a vessel at a marina *on a*
11 *navigable waterway* is a traditional maritime activity), *Foremost Ins. Co. v. Richardson*, 457
12 U.S. 668,674 (1982) (collision between two pleasure boats *on navigable waters* had significant
13 relationship with maritime commerce), *Executive Jet Aviation, Inc. v. City of Cleveland*, 409
14 U.S. 249,268 (1972) (jet aircraft that struck a flock of sea gulls on takeoff and sank in
15 navigable waters not within admiralty jurisdiction), *Seven Resorts, Inc. v. Cantlen*, 57 F.2d 771,
16 774 (9th Cir. 1995) citing *Sisson v. Ruby*, 497 U.S. 358, 367 (1990).

17 A contract is within admiralty jurisdiction if its subject matter is maritime, *CTI*
18 *Container Leasing Corp. v. Oceanic Operations Corp.*, 682 F.2d 377 (2nd Cir. 1982) (contract
19 for lease of cargo shipping containers is maritime). A "maritime" contract is one that relates to
20 a ship in its use as such, or to commerce, or to navigation on navigable waters, or to
21 transportation by sea or to maritime employment. A contract to build a ship is not within
22 admiralty jurisdiction, *Royal Ins. Co. v. Pier 39 LTD*, 738 F.2d 1035, 1036 (9th Cir. 1984),
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19 Complaint, ¶30.

1 *Galt G/S v. Hapag-Lloyd AG*, 60 F.3d 1270 (9th Cir. 1995) (subrogation claim for spoilage of
2 canned hams not related to maritime activities even though transported by ship).

3 A tort claim falls within admiralty jurisdiction if the tort occurs on or over navigable
4 waters and actions giving rise to the tort “bear a significant relationship to traditional maritime
5 activity, *Taghodomi v. U.S.*, 401 F.3d 1080, 1084 (9th Cir. 2005) citing *Executive Jet Aviation,*
6 *Inc. v City of Cleveland*, 409 U.S. 240 (1972); *Whitcombe v. Stevedoring Services of America*,
7 2 F.3d 312 (9th Cir. 1993) (state law, not admiralty law, applied to claim for damage to
8 automobiles in terminal awaiting shipment).

9
10 In *Seven Resorts, Inc.*, the owner of a charter boat filed an action in admiralty seeking
11 indemnity from the lessee of a houseboat on Lake Shasta for alleged personal injuries to
12 another caused by the lessee’s operation of the boat on the lake. The vessel owner argued that
13 the district court had jurisdiction in admiralty over the charter contract, regardless of whether
14 Lake Shasta was a navigable waterway, on the grounds that charter contracts are by definition
15 maritime contracts.

16
17 The Court of Appeals held that admiralty jurisdiction over maritime contracts is
18 “merely a subset of admiralty jurisdiction as a whole”, that the primary focus of admiralty
19 jurisdiction is the protection of maritime commerce, and that maritime commerce means
20 activities related to the business of shipping. “As such, admiralty jurisdiction over both tort
21 and contract issues requires a connection to navigable waters, *Seven Resorts, Inc. v. Cantlen*, 57
22 F.2d at p. 774, citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 736 (1961).

23
24 As alleged in Plaintiffs’ complaint, the Northcoast 125’ was in a Tacoma construction
25 yard and under construction at the time of the alleged misrepresentations. The yacht was not

1 launched until March 2010.²⁰ The worker's alleged injury occurred while the vessel was under
2 construction.²¹ This Court has no admiralty jurisdiction over any of Plaintiffs' claims because
3 there is no connection whatsoever to navigable waters, *Seven Resorts, Inc. v. Cantlen*, 57 F.2d
4 at p. 774. The Northcoast 125' was not on or in navigable waters at the time of the alleged acts
5 but was in a shipyard under construction. Since admiralty jurisdiction is predicated on a
6 connection to navigable waters, this Court has no jurisdiction in admiralty over this action,
7 *Seven Resorts, Inc. v. Cantlen*, 57 F.2d at p. 774, citing *Kossick v. United Fruit Co.*, 365 U.S.
8 731, 736 (1961).

10 **IV. CONCLUSION**

11 Defendants Horton respectfully request the Court dismiss Plaintiffs' complaint on the
12 grounds the Court lacks subject matter jurisdiction in diversity, in admiralty and/or under the
13 *Rooker-Feldman* doctrine.

15 RESPECTFULLY SUBMITTED this 26th day of January, 2012.

16 LEE SMART, P.S., INC.

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25²⁰ Complaint, ¶¶14, 15, 19 and 27.

²¹ Complaint, ¶32.

CERTIFICATE OF SERVICE

I certify that on January 26, 2012, I electronically filed the foregoing DEFENDANTS' EUGENE HORTON, LLC AND EUGENE HORTON'S FRCP 12(B)(1) MOTION TO DISMISS (WITH PROPOSED ORDER ATTACHMENT) and this CERTIFICATE OF SERVICE with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following individuals:

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I further certify that on this same date, I caused to be served by email courtesy copies of the above-described pleadings on the following non CM/ECF participants:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26th day of January, 2012, at Seattle, Washington.

s/ Deborah A. Severson
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